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FIRST GENERAL COUNSEL'S REPORT

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Date Complaint Filed: September 29, 2010
Date of Notification: October 6, 2010
Date of Last Response: November 29, 2010
Date Activated: December 10, 2010
Expiration of Statute
of Limitations
Earliest: July 23, 2015
Latest: December 2, 2015

COMPLAINANT:

Herron for Congress

RESPONDENTS:

Steve Fincher for Congress and Phyllis Patterson,
in her official capacity as treasurer
Gates Banking and Trust Company

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)(3)(E)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.82(a)
11 C.F.R. § 104.3(d)(4)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint alleges that Steve Fincher for Congress and Phyllis Patterson, in her official capacity as treasurer ("Committee"), the authorized committee of Steve Fincher, the 2010 Republican candidate for Tennessee's Eighth Congressional District, misreported the source of a loan as coming from Fincher's personal funds, rather than from Gates Banking & Trust Company ("Gates Bank"). In addition, according to the complaint, if

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1 there was no security interest in the collateral for the loan, Gates Bank made, and the
2 Committee accepted, an illegal corporate contribution.

3 As discussed in more detail below, the ultimate source of the loan to the Committee
4 was Gates Bank, not Steve Fincher's personal funds, and the Committee therefore failed to
5 properly report the loan. Accordingly, we recommend that the Commission find reason to
6 believe that the Committee violated 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4),
7 and enter into pre-probable cause conciliation with the Committee. From the available
8 information, it appears that Gates Bank made the loan in its usual and customary course of
9 business, and the loan met all the criteria for a permissible bank loan. See 11 C.F.R.
10 § 100.82(a). Thus, the Committee did not accept, and Gates Bank did not make, a
11 corporate contribution. Therefore, we also recommend that the Commission find no reason
12 to believe that Gates Bank and the Committee violated 2 U.S.C. § 441b(a), and close the
13 file as to Gates Bank.

14 **II. FACTUAL SUMMARY**

15 The complaint alleges that the Committee's 2010 Pre-Primary Report discloses that
16 Steve Fincher loaned his committee \$250,000 on July 8, 2010, from personal funds, with
17 no due date or interest rate. Complaint at 2. However, according to the complaint, Steve
18 Fincher filed two personal financial disclosure reports, the second of which is attached to
19 the complaint, with the United States House of Representatives covering the periods
20 between January 1, 2009, and September 30, 2009, and January 1, 2010, through May 15,
21 2010, in which he reported only one asset, his farm. See *Id.*, Exhibit B. The complaint also
22 states that an Associated Press article dated August 27, 2010, attached to the complaint,
23 reports that the Chairman of Gates Bank, Warren Nunn, acknowledged that his bank was

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1 the source of the loan to Fincher. *See Id.*, Exhibit C. Since the bank reportedly admitted
2 that it was the source of the loan, the complaint alleges that the Committee violated the
3 reporting provisions of the Act because it failed to disclose the bank loan on Schedule C, § 1724
4 including the name of the bank, the date and amount of the loan, the interest rate, the
5 collateral securing the loan, along with the bank's certification and a copy of the loan
6 agreement. *Id.* at 2. *See* 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(1) and (2). The
7 complaint also alleges that if Gates Bank had no security interest in the collateral for the
8 loan, Gates Bank made, and the Committee accepted, a \$250,000 corporate contribution, in
9 violation of 2 U.S.C. § 441b(a). *Id.* at 3. On October 18, 2010, the complainant filed a
10 supplement to the complaint alleging that the Committee failed to accurately report the loan
11 from Gates Bank on its October 2010 Quarterly Report. Supplemental Complaint at 1.
12 According to the supplement, since the Committee had been on notice of its misreporting at
13 the time that report was filed, the Committee's failure to correct the misreporting was a
14 knowing and willful violation. *Id.* at 2.

15 In its response, the Committee states that Fincher obtained a loan from Gates Bank
16 on July 7, 2010, for \$250,000 with an interest rate of 6.5% per year, and attaches a copy of
17 the mortgage note and security agreement. Committee Response at 2. The Committee
18 states that the loan was a signature loan that was cross-collateralized with other bank debt
19 owed by Fincher, and with accounts held by Fincher on which the bank held a right of
20 offset. *Id.* at 3. The Committee also states that the loan was reported as an itemized receipt
21 on Schedule A and as a loan on Schedule C, the maturity date of the loan was November
22 30, 2010, the loan document lists the purpose of the loan as "business expense," with such
23 business being the candidate's campaign-related purposes, "as evidenced by the cashier's

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1 check made payable to the order of Stephen Fincher for Congress." *Id.* at 2. While the
2 Committee maintains that "all required reports were filed in good faith," it concedes there
3 were "inadvertent reporting errors and omissions that require amended reports to be filed
4 with the Commission." *Id.* at 1. The Committee states that these reports are being
5 prepared and will be provided "as soon as practicable." *Id.*

6 In its Response, Gates Bank states that "following its usual and customary business
7 practice," it analyzed Mr. Fincher's creditworthiness and collateral, and approved his loan
8 application. Gates Bank Response at 1. Both the Committee's and Gates Bank's responses
9 state that the bank loan complied with all of the criteria set forth in 11 C.F.R. § 100.82 for
10 a bank to permissibly make a loan to a candidate or his or her committee. *Id.* at 2,
11 Committee Response at 3. According to the Committee's Response, the loan was repaid in
12 full on November 17, 2010. Committee Response at 4.

13 **III. LEGAL ANALYSIS**

14 **A. Reporting**

15 The Act provides that each report shall identify the person who makes a loan to the
16 reporting committee during the reporting period, together with the identification of any
17 endorser or guarantor of such loan, and date and amount or value of such loan. 2 U.S.C.
18 § 434(b)(3)(E). When a candidate obtains a bank loan in connection with the candidate's
19 campaign, the candidate's principal campaign committee shall disclose on Schedule C-1 to
20 the report covering the period when the loan was obtained, the date, amount, and interest
21 rate of the loan, the name and address of the lending institution, and the types and value of
22 collateral or other sources of repayment that secure the loan, advance, or line of credit, if
23 any. 11 C.F.R. § 104.3(d)(4).

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1 The Committee acknowledges that it failed to properly report the loan on its
2 original 2010 Pre-Primary Report. The ultimate source of the loan was Gates Bank; it
3 loaned the candidate \$250,000, which the candidate then loaned to the Committee. For this
4 loan, Schedule C should have disclosed "the type/source of the loan the candidate
5 received," such as a bank loan, in the first box for endorsers or guarantors with a notation
6 for loan type, or should have listed it in the "Loan Source" box after the candidate's name.
7 See Instructions for FEC Form 3 and Related Schedules at 14. The terms of the loan
8 between the candidate and the Committee should also have been listed in the appropriate
9 boxes. *Id.* On Schedule C to the Committee's 2010 Pre-Primary Report, however, the
10 Committee listed Steve Fincher's name with "personal funds" in brackets after his name,
11 instead of listing "bank loan" after the candidate's name in the "Loan Source" box, or in
12 the first box for endorsers or guarantors with a notation of the loan type. With respect to
13 the terms of the loan, the due date of the loan from the candidate to the Committee is
14 incorrectly listed as July 7, 2010, which is the day before the candidate made the loan to the
15 Committee, rather the due date agreed upon between the candidate and the Committee.
16 The Committee also failed to file a Schedule C-1 to the 2010 Pre-Primary Report,
17 disclosing that the loan was derived from a lending institution, and other required
18 information. The Committee's original 2010 October Quarterly Report also contained the
19 incorrect Schedule C. Accordingly, we recommend that the Commission find reason to
20 believe that Steve Fincher for Congress and Phyllis Paterson, in her official capacity as
21 treasurer, violated 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4).

22 As noted, the October 14, 2010, supplement to the complaint alleges that the
23 Committee engaged in knowing and willful conduct by failing to correct its misreporting

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1 by the time of its 2010 October Quarterly Report. In its response to the complaint dated
2 November 26, 2010, the Committee asserted that it acted in good faith in filing its
3 disclosure reports, but made inadvertent errors that it was in the process of correcting in
4 forthcoming amendments. On December 2, 2010, the Committee filed an amendment to its
5 2010 Pre-Primary Report by including a Schedule C-1 with the required information about
6 the bank loan, including the collateral. The Schedule C to the Amended 2010 Pre-Primary
7 Report removes the words "personal funds" after Steve Fincher's name, but does not list
8 "bank loan" after Fincher's name, and still shows the due date of the loan from the
9 candidate to the Committee as July 7, 2010, rather than the due date agreed upon between
10 the candidate and the Committee. The Committee also amended its 2010 October
11 Quarterly Report on December 2, 2010, by filing the same Schedule C as appears with its
12 amended 2010 Pre-Primary Report. The Committee's 2010 Post-General Report discloses
13 that the Committee paid \$250,000 to Fincher on November 17, 2010, to repay the loan
14 made by the candidate. The Schedule C to the 2010 Post-General Report shows no
15 outstanding balance on the loan at the close of this reporting period. Both the Committee
16 and Gates Bank state that Steve Fincher repaid the loan in full to Gates Bank on November
17 17, 2010, which is before the maturity date of November 30, 2010. Committee Response at
18 3 and Gates Bank Response at 2.

19 While the public would have been better served by more timely amendments, we
20 have no information suggesting that the Committee intentionally delayed submitting them,
21 so we do not recommend that the Commission find that the Committee's reporting
22 violations were knowing and willful.

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B. Corporate Contribution

The complaint also raises the possibility of an illegal corporate contribution because the Committee's original filing did not reflect that the source of the loan was Gates Bank, or describe the collateral securing the loan. The Act prohibits corporations such as Gates Bank from making, and the Committee from knowingly accepting, a contribution in connection with any federal campaign. 2 U.S.C. § 441b(a).¹ The Commission's regulations provide that a loan of money to a political committee or a candidate is not a contribution by the lending institution if such loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business. 11 C.F.R. § 100.82(a). A loan will be deemed in the ordinary course of business if it (1) bears the usual and customary interest rate of the lending institution for the category of loan involved; (2) is made on a basis that assures repayment; (3) is evidenced by a written instrument; and (4) is subject to a due date or amortization schedule. *Id.*

Although the complaint focused on whether Gates Bank had adequate collateral to secure the \$250,000 loan, both the Committee and the bank addressed all of the criteria in 11 C.F.R. § 100.82. Both the Committee and the bank provided the loan documentation, which includes a "Multipurpose Note and Security Agreement." See Committee Response, Attachment B; see also Gates Bank Response, Attachment A. The agreement provides for a \$250,000 loan at a 6.5% interest rate, states that the maturity date is November 30, 2010, and describes the purpose of the loan as "business expense." According to the Multipurpose Note and Security Agreement, under the security section, the loan is described as a signature loan, but there is a box checked which reads "All debts – The

¹ Gates Bank is a state-chartered commercial bank.

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1 above property will also serve as security for all of my present and future debts to you," but
2 such property is not identified in the document. However, page two of the agreement
3 entitled "Additional Terms of the Note and Security Agreement," states that the Bank has
4 the right to set off Fincher's deposit accounts (item 5), and that "(e)ach present or future
5 agreement securing debt I owe you will also secure the payment of this Loan," with
6 separate provisions concerning the debtor's private dwelling and household goods (item 7).
7 Both parties also provided a UCC Financing Statement covering the crop production on
8 Fincher's farm in Tennessee, and a deed of trust on Fincher's residence that shows that
9 Gates Bank has a security interest in the residence. See Gates Bank Response, Attachments
10 D and E; *see also* Committee Response, Attachment E.

11 With respect to the first criteria to determine whether the loan was made in the
12 ordinary course of business, which requires the loan to bear the usual and customary
13 interest rate offered by the lending institution for that category of loan, both the Committee
14 and Gates Bank state in their respective responses that the interest rate of 6.5% per year
15 was 3.25% over New York Prime, and was Gates Bank's usual and customary interest rate
16 for the category of the loan involved. Committee Response at 3, Gates Bank Response at
17 3. We have no information to the contrary.

18 Likewise, both the Committee and Gates Bank assert that the second criteria, that
19 the loan be made on a basis that assures repayment, was also met, and provide supporting
20 documentation. A loan shall be considered made on the basis that assures repayment if the
21 lending institution making the loan has perfected a security interest in collateral owned by
22 the candidate or political committee receiving the loan, the fair market value of the
23 collateral is equal to or greater than the loan amount and any senior liens as determined on

1 the date of the loan, and the candidate or political committee provides documentation that
2 shows that the lending institution has a perfected security interest in the collateral.
3 11 C.F.R. § 100.82(e)(1). Sources of collateral include, but are not limited to, ownership in
4 real estate, personal property, goods, negotiable instruments, certificates of deposit, chattel
5 papers, stocks, accounts receivable, and cash on deposit. *Id.* As noted, page two of the
6 security agreement provides that the loan was cross-collateralized with other bank debt
7 owed by Fincher, and with accounts held by Fincher. See Gates Bank Response,
8 Attachment A; see also Committee Response, Attachment B. According to documents
9 submitted with the responses, at the time of the loan, Gates Bank had a perfected interest in
10 Fincher's personal residence, as evidenced by a Deed of Trust, a lien on all of Fincher's
11 2010 crops as evidenced by a UCC Financing Statement for the crop production note which
12 they state is on file with the Tennessee Secretary of State, and a right-of-offset to his
13 deposit accounts.² See Gates Bank Response, Attachments D and E; see also Committee
14 Response, Attachment E. According to Gates Bank, given the perfected security interest in
15 the 2010 crops and Fincher's personal residence, it did not file a separate UCC Financing
16 Statement for the campaign loan since the same assets were the collateral for that loan. In
17 addition, Gates Bank states that its loan analysis for Fincher's loan showed the equity in
18 its "existing secured loans coupled with Mr. Fincher's non-interest bearing account
19 substantially exceed the campaign loan amount." Gates Bank Response at 3. While the
20 bank did not provide information as to the value of Fincher's farm, the 2010 crops, and his
21 personal residence or the amount of funds in Fincher's non-interest bearing deposit

² The UCC Financing Statement for the crop production note is dated January 5, 2010, and lists Stephen and Lynn Fincher Farms as the debtor. The UCC Financing Statement covers 2010 farm crops grown on 2,290 acres in Hardeman and Haywood Counties in Tennessee, and best interest in all equipment. The indebtedness is \$600,000.

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1 account, or whether the collateral was adequate to satisfy Fincher's total indebtedness, we
2 have no information suggesting that the \$250,000 loan to Fincher's committee was under-
3 collateralized. As noted, the loan was repaid in full before the maturity date.

4 The third and fourth criteria are that the loan is evidenced by a written instrument,
5 and is subject to a due date or amortization schedule. The loan documentation, signed by
6 Fincher, shows that the loan had a maturity date of November 30, 2010. See Gates
7 Response, Attachment A; see also Committee Response, Attachment B.

8 Thus, based on the available information, it appears that Gates Bank made the loan
9 in the ordinary course of business. Therefore, we recommend that the Commission find no
10 reason to believe that Gates Banking and Trust Company made, or Steve Fincher for
11 Congress and Phyllis Paterson, in her official capacity as treasurer, accepted, a corporate
12 contribution in violation of 2 U.S.C. § 441b(a), and close the file as to Gates Banking and
13 Trust Company.

14 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

15 Attached is a proposed conciliation agreement with the Committee

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16 **V. RECOMMENDATIONS**

- 17 1. Find reason to believe that Steve Fincher for Congress and Phyllis Patterson,
18 in her official capacity as treasurer, violated 2 U.S.C. § 434(b)(3)(E) and
19 11 C.F.R. § 104.3(d)(4).
20
21 2. Find no reason to believe that Steve Fincher for Congress and Phyllis
22 Patterson, in her official capacity as treasurer, violated 2 U.S.C. § 441b(a).
23
24 3. Find no reason to believe that Gates Banking and Trust Company violated
25 2 U.S.C. § 441b(a).
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27 4. Enter into conciliation with Steve Fincher for Congress and Phyllis Patterson,
28 in her official capacity as treasurer, prior to a finding of probable cause to
29 believe.
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5. Approve the attached conciliation Agreement.
6. Approve the attached Factual and Legal Analyses.
7. Close the file as to Gates Banking and Trust Company
8. Approve the appropriate letters.

3/9/11
Date

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